Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

VICENTE HERNANDEZ-VARGAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Tenth Circuit Erroneously Hold that the United States Lawfully Seized Petitioner When Most of the Supporting Facts Occurred Subsequent to the Seizure of the Petitioner And the Remaining Allegations Regarding the Suitcases Fail to Provide a Reasonable Basis in Violation of the Fourth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Sup. Ct. R. 14.1.(b), no other parties are now or have been interested in this litigation or related proceedings. The trial co-defendants and co-appellants to the United States Court of Appeals for the Tenth Circuit were Mario Israel Gastelum-Murguia and Adolfo Alvarez, whose counsel were David C. Serna and Edward O. Bustamante, respectively, both of Albuquerque, New Mexico.

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IN THE
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

REFERENCE TO REPORTS OF OPINIONS

The August 8, 1995 order and judgment and September 21, 1995 order of the United States Court of Appeals for the Tenth Circuit denying Mr. Hernandez-Vargas' petition for rehearing, from which Petitioner seeks to appeal and which are attached as Appendix 1 and 2, respectively. The August 8, 1995 order

and judgment was not published or reported and is cited as follows:

> United States v. Hernandez-Vargas, No. 94-2176, slip. op. (10th Cir. Aug. 8, 1995).

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued an order and judgment on August 8, 1995 and affirming the trial court's denial of Petitioner's motion to suppress. The United States Court of Appeals for the Tenth Circuit issued an order on September 21, 1995 denying Petitioner's motion for rehearing.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV states, in pertinent part, as follows:

> The right of the people to be secure in their persons ... and effects, against unreasonable searches and seizures, shall not be violated ....

STATEMENT OF THE CASE

Petitioner was indicted on one (1) count of possession with intent to distribute more than 5 kilograms of cocaine in violation of 21 U.S.C. sec. 841(a)(1) and 21 U.S.C. sec. 841(b)(1)(A).

Mario Israel Gastelum-Murguia and Adolfo Alvarez were also charged with the same count as Petitioner. At Petitioner's trial, Messrs. Gastelum-Murguia and Alvarez were found guilty along with Petitioner.

On March 11, 1995 Mr. Hernandez-Vargas filed a motion to suppress physical evidence and statements seized pursuant to the seizure of Mr. Hernandez-Vargas on Amtrak Train 4 in Albuquerque, New Mexico. On April 29, 1994 the United States District Court for the District of New Mexico heard Mr. Hernandez-Vargas' motion to suppress.

The District Court denied Mr. Hernandez-Vargas' motion without entry of a written order. The District Court's April 29, 1994 oral findings denying the motion to suppress are attached as Appendix 4.

On July 26, 1994 the district court sentenced Petitioner to 120 months in prison plus terms of supervised release thereafter. (Appendix 3)

Upon appeal to the United States Court of Appeals for the Tenth Circuit, in its August 8 order and judgment attached as Appendix 2, the Tenth Circuit affirmed the District Court's denial of Mr. Hernandez-Vargas' motion to suppress and conviction.

On August 22, 1995 Mr. Hernandez-Vargas filed a petition for rehearing, arguing that the United States Court of Appeals overlooked or misapprehended that

the key and important facts upon which it relied in affirming the District Court occurred after the point in time at which Mr. Hernandez-Vargas was initially seized under the Fourth Amendment and that its affirmance of the District Court was error as a matter of law.

On September 21, 1995 the United States Court of Appeals for the Tenth Circuit entered an order summarily denying Mr. Hernandez-Vargas' petition for rehearing.

ARGUMENT

The United States Court of Appeals for the Tenth Circuit Erroneously Held that the United States Lawfully Seized Petitioner When Most of the Supporting Facts Occurred Subsequent to the Seizure of the Petitioner And the Remaining Allegations Regarding the Suitcases Fail to Provide a Reasonable Basis in Violation of the Fourth Amendment to the United States Constitution.

The District Court held and the United States Court of Appeals affirmed that Mr. Hernandez-Vargas was seized upon the initial encounter with government agents in the lower level of the Amtrak lounge car.

The District Court's findings, contained in Appendix 4 at pages 186, 185, indicate that Mr. Hernandez-Vargas was "seized briefly while [he] responded to questions" from the government agents, that it was a "permissive seizure, [a] brief seizure", a "brief, ... although ... not ... [a] non-intrusive" seizure.

The District Court's oral findings on April 29, 1994 were interpreted by the United States Court of Appeals as having found a seizure of Mr. Hernandez-Vargas when initially encountered by the government agents:

> The trial court characterized the initial encounter as an investigatory stop which required the officer to have only "specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime.
>
> (Appendix 2 at 5)

Upon appeal to the United States Court of Appeals for the Tenth Circuit, in its August 8 order and judgment, the Tenth Circuit held:

> The trial court further found that "under the totality of the circumstances, the fact that the three defendants were travelling under the same name on the same ticket, and when they denied knowing each other, that gave rise to reasonable articulable specific facts which gave a reasonable suspicion that ... at least a crime was being committed."
>
> (Appendix 2 at 5-6)
>
> A review of the applicable law convinces us that the district court analyzed the motion to suppress correctly. The District Court's factual findings are not clearly erroneous. The evidence demonstrated that Delsey bags were used by drug dealers

> because of their air-tight construction and that it was highly unusual for them to be placed in overhead bins. Although not specifically set forth as a finding, the evidence was that the three defendants had seats in close proximity to the Delsey bags. Hernandez and Alvarez denied knowing Gastelum and he denied knowing them.
>
> All three tickets, however, had been purchased in the name of one individual, Alfredo Lara.
>
> (Appendix 2 at 6-7)

However, the immediately foregoing facts, as indicated by the record and the trial court's findings in Appendix 4, as relied on by the United States Court of Appeals, did not occur prior to the time Mr. Hernandez-Vargas was seized. According to Appendix 4 at lines 23-24 of page 179 D.E.A. Task Force Agent Barela approached Mr. Hernandez-Vargas and Agent Small approached Mr. Alvarez, and Agent Small then encountered Mr. Hernandez-Vargas at line 11 of page 180.

Not a part of the findings, but a part of the record, the United States first learned that Mr. Hernandez-Vargas had his seat in proximity to the Delsey luggage when it searched Mr. Hernandez-Vargas after he had been arrested. Furthermore, as indicated in Appendix 4 at page 181, Mr. Hernandez-Vargas followed Agent Small to the seats near the Delsey suitcases. Consequently, the United

States did not know that Mr. Hernandez-Vargas' seat was in close proximity to the Delsey luggage at the time of the initial seizure of Mr. Hernandez-Vargas as found by the District Court and affirmed by the United States Court of Appeals.

The government agents, who knew that Mr. Hernandez-Vargas knew and was travelling with Mr. Alvarez, first learned that Mr. Hernandez-Vargas and Mr. Alvarez allegedly did not know Mr. Gastelum-Murguia in Appendix 4 at page 182, well after the initial seizure of Mr. Hernandez-Vargas. The United States first learned that Mr. Gastelum-Murguia allegedly did not know Mr. Hernandez-Vargas or Mr. Alvarez in Appendix 4 at page 183. Consequently, the United States did not know that "Hernandez and Alvarez denied knowing Gastelum and he denied knowing them" at the time Mr. Hernandez-Vargas was initially seized as affirmed by the United States Court of Appeals.

The United States first learned that Mr Hernandez-Vargas and the two co-defendants were travelling on tickets in the name of Alfredo Lara, as indicated by Appendix 4 at page 183, well after the initial seizure of Mr. Hernandez-Vargas. Consequently, the United States did not know that the three co-defendants were travelling on train tickets in the name of a fourth person, Alfredo Lara, until well after the initial seizure of Mr. Hernandez-Vargas.

The fundamental point of constitutional law that a seizure under the Fourth Amendment cannot be

retroactively or retrospectively justified by what is learned pursuant to the seizure is the focus of this petition. In other words, the allegations that "the three defendants had seats in close proximity to the Delsey bags", "Hernandez and Alvarez denied knowing Gastelum and he denied knowing them", and "(a)ll three tickets, however, had been purchased in the name of one individual, Alfredo Lara", were improperly relied on by the United States Court of Appeals to support the earlier initial seizure of Mr. Hernandez-Vargas. These allegations could not be considered or weighed in the determination of whether sufficient, adequate and reasonable basis existed for the seizure of Mr. Hernandez-Vargas. Consequently, the United States Court of Appeals improperly affirmed Mr. Hernandez-Vargas' conviction by its error.

The error arises from the very fundamental point of law articulated by this Court in Terry v. Ohio, 392 U.S. 1, 21-22 (1968), wherein this Court first articulated the constitutionality of a seizure of a person based on less than probable cause:

> And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at **the moment of the seizure** ... "warrant a man of reasonable caution in the belief" that the action taken was appropriate?
>
> (Emphasis added).

Consequently, the analysis whether a police officer had a reasonable basis for a Terry seizure must be based on the information the government agents possessed "at the moment of the seizure". What the government agents learned later was untimely and irrelevant to the Terry analysis.

In 1978 this Court reiterated this fundamental point in Scott v. United States, 436 U.S. 128, 137 (1978), in an opinion by then Justice Rehnquist, wherein this Court stated that the proper approach for evaluating compliance with the minimization requirement for wiretaps set forth in the Omnibus Crime Control and Safe Streets Act, like the evaluation of all alleged violations of the Fourth Amendment, is to assess the agent's or officer's actions in light of the circumstances confronting him at the time.

> Although we have not examined this exact question at great length in any of our prior opinions, almost without exceptionin evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.
>
> Terry v. Ohio, 392 U.S. at 137.

The facts and circumstances known to the government agents at the time of the initial seizure of Mr. Hernandez-Vargas did not include the allegations that "the three defendants had seats in close proximity to the Delsey bags", "Hernandez

and Alvarez denied knowing Gastelum and he denied knowing them", and "(a)ll three tickets, however, had been purchased in the name of one individual, Alfredo Lara". Those facts and circumstances were not known to the government agents at time of the initial seizure of Mr. Hernandez-Vargas because those allegations arose later during the seizure.

Consequently, the United States Court of Appeals for the Tenth Circuit erroneously affirmed the reasonableness of the seizure of Mr. Hernandez-Vargas on the basis of allegations unknown to the government agents at the time of the seizure. Consequently, the United States Court of Appeals for the Tenth Circuit's decision is contrary to this Court's decision in Terry v. Ohio and Scott v. United States.

Therefore, the United States Court of Appeals August 8, 1995 Order and Judgment must be reversed unless a reasonable basis to seize Mr. Hernandez-Vargas is provided when "Delsey bags [which] were used by drug dealers because of their air-tight construction and that it was highly unusual for them to be placed in overhead bins." (Appendix 2 at 7) These allegations that the type and location of the suitcases are insufficient to provide a reasonable basis for the United States to have seized Mr. Hernandez-Vargas as found by the District Court, especially when the District Court, as indicated in Appendix 4, did not base the seizure on the type or placement of the suitcases. United States v. Bloom, 975 F.2d 1447, 1458 (10th Cir.1992)("Agent Small's

testimony that Defendant's luggage was of a type commonly used by drug traffickers is afforded little weight in our analysis.").

D.E.A. Agent Small had not requested permission to speak to Mr. Hernandez-Vargas, nullifying any assertion that the encounter was consensual. United States v. Shaibu, 920 F.2d 1423, 1427-28 (9th Cir.1990); United States v. Brown, 731 F.2d 1491, 1493 (11th Cir.1984), quoting Florida v. Royer, 460 U.S. 491 (1983).

Pursuant to that seizure, Mr. Hernandez-Vargas was questioned, searched, and informed that he did not possess valid proof that he was in the United States lawfully. Thereafter, Agent Small did not inform Mr. Hernandez-Vargas of his custodial status. Small's failure to inform Mr. Hernandez-Vargas of his custodial status after not being able to produce valid proof of his legal presence in the United States constituted a seizure of Mr. Hernandez-Vargas because of the consequent necessary compulsion by Mr. Hernandez-Vargas to submit to the government agent's subsequent requests and conduct. United States v. Grant, 920 F.2d 376, 383 (6th Cir.1990); United States v. Patino, 649 F.2d 724, 727 (9th Cir.1981); United States v. Nevarez-Alcantar, 495 F.2d 678, 680 (10th Cir.1974).

Then D.E.A. Agent Small asked Mr. Hernandez-Vargas if he would go upstairs so Small could show him something. Without speaking, Mr. Hernandez-Vargas arose, climbed the stairs and turned right. Under the circumstances of Mr.

Hernandez-Vargas not knowing if he was in custody or free to leave due to his inability to produce valid proof of his legal presence in the United States, Mr. Hernandez-Vargas had no reasonable choice other than to accompany Agent Small regardless of how politely Agent Small requested. United States v. Gonzales, 763 F.2d 1127, 1132 (10th Cir.1985); United States v. Grant, 920 F.2d at 383; United States v. Patino, 649 F.2d at 727.

Furthermore, Agent Small, prior to asking Mr. Hernandez-Vargas and Mr. Alvarez to go upstairs, did not ask Mr. Hernandez-Vargas during the investigation downstairs in the Amtrak lounge car where his seat was or if he had any luggage. Instead, Agent Small took Mr. Hernandez-Vargas out of the lounge car and into a coach car. The movement of Mr. Hernandez-Vargas exceeded the scope of a Terry seizure based on reasonable suspicion and escalated the seizure to an arrest without probable cause. Hayes v. Florida, 470 U.S. 811 (1985); Florida v. Royer, 460 U.S. 491 (1983); Dunaway v. New York, 442 U.S. 200 (1979); Davis v. Mississippi, 394 U.S. 721 (1969). The United States Court of Appeals for the Tenth Circuit failed to address this issue. (Appendix 2)

Agent Small then directed Mr. Hernandez-Vargas back to the right and led them to seats 11 and 12 in a coach car. Upon arrival at seats 11 and 12, Mr. Hernandez-Vargas, having not been read his Miranda rights, responded to a question from Agent Small that he did not own two of the three suitcases in this matter. The District Court ruled and the United

States Court of Appeals affirmed that Mr. Hernandez-Vargas abandoned his interest in those suitcases. Under the circumstances of the seizure of Mr. Hernandez-Vargas and the failure of government agents to administer Miranda rights to Mr. Hernandez-Vargas, the abandonment by Mr. Hernandez-Vargas was involuntary and improper. United States v. Ward, 961 F.2d 1526, 1535 (10th Cir.1992)("(W)hen an alleged abandonment is preceded by a Fourth Amendment violation, the abandonment is valid only if, based on the totality of the circumstances, the abandonment is voluntary in fact, while giving sufficient weight to the three factors emphasized in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)."). The Tenth Circuit also did not make any analysis of the voluntariness of the abandonment even though it held that Mr. Hernandez-Vargas was seized at the time. (Appendix 2)

The government seized the suitcases in this case not based on the holding of United States v. Place, 462 U.S. 696 (1983). Instead, the government seized the suitcases because Mr. Hernandez-Vargas and Mr. Alvarez abandoned them when they denied ownership over the suitcases.

Pursuant to the seizure of the suitcases, a canine sniffing canine alerted to the suitcases and the government agents later discovered more than 5 kilograms of cocaine in the suitcases.

Consequently, because the seizure of Mr. Hernandez-Vargas in this case was

unreasonable and violative of his Fourth Amendment constitutional rights, the evidence seized pursuant to the unconstitutional seizure of Mr. Hernandez-Vargas' person and effects was itself unconstitutionally seized as fruit of the poisoned tree. Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

For the foregoing reasons this Court, pursuant to Sup. Ct. R. 10.1 should grant this petition because the United States Court of Appeals for the Tenth Circuit (1) has decided an important federal question in a way that conflicts with the applicable decisions of this Court; (2) rendered a decision in conflict with the decisions of other United States Court of Appeals; and (3) sanctioned a departure from the accepted and usual course of judicial proceedings by the lower United States District Court as to call for an exercise of this Court's power of supervision.

REQUEST FOR RELIEF

WHEREFORE, for any and all of the foregoing reasons, Mr. Hernandez-Vargas respectfully requests this Court grant his petition. Mr. Hernandez-Vargas also requests such other and further relief as this Court deems just and proper.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 94-2176

VICENTE HERNANDEZ-VARGAS,

Defendant-Appellant.

ORDER
Entered September 21, 995

Before ANDERSON and HOLLOWAY, Circuit Judges, and ELLISON*, Senior District Judge.

*Honorable James O. Ellison, Senior District Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

This matter comes on for Consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

PATRICK FISHER, Clerk
By: /s/ Audrey F. Weigel
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 94-2172
(D.C. No. CR 93-654-JB)
(D. N.M.)
MARIO ISRAEL GASTELUM-MURGUIA,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 94-2176
(D.C. No. CR 93-654-JB)
(D. N.M.)
VICENTE HERNANDEZ-VARGAS,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v. No. 94-2178
(D.C. No. CR 93-654-JB)
(D. N.M.)
ADOLFO ALVAREZ,

Defendant-Appellant.

ORDER AND JUDGMENT

This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Before **Anderson** and **Holloway**, Circuit Judges, and Ellison,** Senior District Judge.

The issues on appeal in these three related cases are virtually identical.

The three defendants, Gastelum, Hernandez, and Alvarez were charged by indictment with possession with intent to distribute more than five kilograms of cocaine. All defendants pled not guilty and filed motions to suppress which were denied. After trial by jury all three defendants were found guilty.

On appeal, all defendants urge that the trial court was in error in denying the defendants' motions to suppress. The defendant Gastelum also urges that the court erroneously admitted identification testimony and improperly instructed the jury.

Factual Background

The defendants were traveling from Los Angeles to Chicago on Amtrak Train No. 4. The train stopped in Albuquerque on November 17, 1993 where it was met by an interdiction detail made up of members of the Drug Enforcement Administration (DEA) and the Albuquerque Police Department (APD). The defendants left the train, went to the platform, and talked. DEA Special Agent Kevin Small entered the train from the rear to observe the sleeping cars while APD Detective Mark Barela entered the train from the front to observe the coach cars. Detective Barela advised Special Agent Small that in Car 413 he had observed two large Delsey suitcases in the overhead bin. Small proceeded to Car 413 and observed a large blue Delsey suitcase in the overhead bin above seat 34 and a black Delsey suitcase in the overhead bin above seats 11 and 12. Small determined that the suitcase above seat 34 was heavy. The agents believed that such placement of large suitcase are used by drug smugglers because they are air-tight. Agent Small and Detective Barela left the train and advised Detective Samuel Candelaria of the suitcases.

The Honorable James D. Ellison, Senior District Judge, United States District for the Northern District of Oklahoma, sitting by designation.

Small reboarded the train after the majority of the passengers had returned to it. After noticing Alvarez leaning over seats 11 and 12, Small and Barela followed defendants Hernandez and Alvarez to the lounge car. Agent Small approached Alvarez, showed his credentials, and asked if he could speak to him. Alvarez apparently did not speak English so Small attempted to use Spanish. Ultimately another individual in the lounge car acted as a Spanish translator between Small and Alvarez. Small asked for his ticket, and Alvarez stated that Hernandez had his ticket. Small then joined the table where Hernandez was speaking to Detective Barela. Small asked to see his ticket and Hernandez handed Small two ticket stubs in the name of Alfredo Lara. They were one-way tickets purchased for cash on the day of departure. Hernandez consented to a search of his person for drugs. No drugs were found. Small returned to Alvarez who also consented to a search of his person for drugs. No drugs were found, but a folding knife was found which the agent retained.

The agents asked the two men if they would come upstairs and look at something. They proceeded to seats 11 and 12 in car 413. Hernandez identified as his two duffle bags which were on the floor in front of seats 11 and 12; he consented to a search of them. No drugs were discovered in this search. Special Agent Small asked Alvarez and Hernandez if the blue Delsey suitcase and a flowered suitcase in the overhead bin above their seats belonged to either of them. Both denied ownership of either

bag. Upon inquiry all passengers in the vicinity of seats 11 and 12 denied that the bags belonged to any of them. Small and Barela left the area and advised Detective Candelaria that no one claimed the suitcases.

Candelaria then approached Gastelum and advised him that he was a police officer and asked if he could speak to him. Consent was given. Gastelum stated that he had boarded the train in Los Angeles and was en route to Chicago. Gastelum produced a one-way ticket stub from Los Angeles to Chicago in the name of Alfredo Lara. He denied knowing Hernandez or Alvarez.

The detective asked about his luggage whereupon Gastelum went to seat 34 and took a red duffle bag from the overhead bin. The bag had been located in the bin next to the black Delsey. The duffle bag contained no contraband. Candelaria asked if the black Delsey bag was his and Gastelum responded that it was not. Gastelum consented to a search for luggage keys. None were found.

The officers requested the train attendant to make further inquiry of passengers as to ownership of the two Delsey bags and one soft flowered suitcase. No one came forward to claim them.

The team carried the two Delsey suitcases and the flowered bag to the train platform where a drug dog alerted to all three suitcases. The team returned to the car and placed the three

defendants under arrest.

Disposition
Standard of Review

"When reviewing a district court's denial of a motion to suppress evidence, we accept the district court's factual findings and determinations of witness creditability unless they are clearly erroneous [,] . . . view[ing] the evidence in the light most favorable to the district court's ruling." United States v. Flores, 48 F.3d 467, 468 (10th Cir. 1995). "The ultimate determination of reasonableness [of the seizure under the Fourth
Amendment, however is a conclusion of law that we review de novo." United States v. Pena, 920 F.2d 1509, 1514 (10th Cir. 1990).

Motions to Suppress

All defendants filed motions to suppress, questioning the validity of the search and seizure on the train, and their ultimate arrest. The trial court characterized the initial encounter as an investigatory stop which required the officer
to have only "specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or, is committing a crime." The trial court further found that "under the totality of the circumstances, the fact that the three defendants were travelling under the same name on the
same ticket, and when they denied knowing each other, that gave rise to reasonable articulable specific facts which gave

reasonable suspicion that . . . at least a crime was being committed." Further, since defendants denied ownership of the bags, they did not have a reasonable e-xpectation of privacy in them, and had no standing to object to the seizure or search of the bags.

This court has recognized three basic types of encounters[1] between individuals and police: voluntary cooperation, Terry investigative stops and arrests. A consensual encounter involves the voluntary cooperation of a citizen with noncoercive questioning. Such are not considered seizures within the meaning of the Fourth Amendment. United States v. Morgan, 936 F.2d 1561, 1566 (10th Cir. 1991).

A Terry investigative stop is a brief, nonobtrusive detention during preliminary questioning or a frisk of weapons. Terry v. Ohio, 392 U.S. 1, 21-22 (1968). Such stops constitute seizures which must be supported by a reasonable suspicion that a person has committed or is committing a crime. Id.

The third type of encounter is an arrest, which is characterized as highly intrusive and involves detention.

---

[1]It is clear the trial court's analysis was of these three types of encounters although he obviously misspoke when he referred to a Terry stop and an investigative stop as two different types of encounters. The standard to be applied is the same.

An arrest must be supported by probable cause to believe that a person has committed or is committing a crime. U.S. v. LaBoy, 979 F.2d 795, 798 (10th Cir. 1992) (citing United States v. Morgan, 936 F.2d at 1566). A preview of the applicable law convinces us that the district court analyzed the motion to suppress correctly. The District Court's factual findings are not clearly erroneous. The evidence demonstrated that Delsey bags were used by drug dealers because of their air-tight construction and that it was highly unusual for them to be placed in overhead bins. Although not specifically set forth as a finding, the evidence was that the three defendants had seats in close proximity to the Delsey bags. Hernandez and Alvarez denied knowing Gastelum and he denied knowing them. All three tickets, however, had been purchased in the name of one individual, Alfredo Lara.

Since the facts as found by the trial court are not clearly erroneous we must accept them in our de novo analysis of the seizure under the Forth Amendment. United States v. Pena, 920 F.2d at 1514. Based on these facts, the trial court was correct in finding the seizure constitutionally sound as an investigative stop. The facts as determined by one district court establish a reasonable suspicion that the defendants had committed or were committing a crime. The trial court's
denial of the motion to suppress any statements or evidence obtained by the seizure is affirmed.

Defendants also contest the constitutionality of the arrest. The arrest following the investigatory stop was made after the officers had taken the three bags to the train platform where a dog trained to detect narcotics alerted to all three suitcases. This event, coupled with the reasonable suspicion that the defendants were committing a crime clearly constituted probable cause sufficient to justify the warrantless arrest. The contents of the three bags and the statements of the defendants were properly admitted in evidence.

In this analysis we are not unmindful of our holding in United States v. Little, 18 F.3d 1499 (10th Cir. 1994). However, in that case the issue was whether under the totality of the circumstances a seizure had taken place. Here there is no real dispute; the district court held that a seizure had taken place, and the issue is whether it was constitutionally valid under the Fourth Amendment.

Motion to Suppress Photographic Identification

Appellant Gastelum also sought to suppress evidence of a photographic array containing his picture. The photographs had been submitted to Faye Williams, the Amtrak ticket agent who sold the three tickets in the name of Alfredo Lara. She identified Gastelum as the individual who purchased the three tickets.

Evidence introduced at the suppression hearing established that Ms. Williams had seen Gastelum for 30-45

minutes and talked to him for 5-6 minutes. Ms. Williams described the man who purchased the tickets as being a short, middle-aged Hispanic man who wore a mustache.

This description was given to Detective Candelaria before he composed the array. Six photographs of persons who were similar in appearance to that description were presented to Ms. Williams. He told her that the photographs may or may not contain the picture of the man who purchased the tickets. Ms. Williams identified Gastelum's photograph as the man who had purchased the ticket. The district judge found that the array was of persons who appear to be persons of similar appearance, the opportunity to observe the defendant was extensive, and the ticket agent accurately described the defendant before being presented with the array of photographs.

The trial court was not clearly erroneous in its findings. It properly considered the totality of the circumstances. See United States v. Sanchez, 24 F.3d 1259, 1262 (10th Cir. 1994). When considered on a de novo standard and accepting the trial court's findings, it is clear that the admission of the photographic evidence did not violate due process and was constitutionally reliable.

The trial court's denial of the motion to suppress identification is affirmed.

Propriety of Jury Instruction 7

In this instruction the court instructed as follows:

> Title 21, United States Code, Section 841 (a)(1), makes it a crime for anyone knowingly or intentionally to possess a controlled substance with intent to distribute it. Cocaine is a controlled substance within the meaning of the law.
>
> * * *
>
> For you to find the defendant Vicente Hernandez-Vargas guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> First: That the defendant knowingly possessed a controlled substance;
> Second: That the substance was in fact cocaine; and,
> Third: That the defendant possessed the cocaine with the intent to distribute it.
>
> * * *
>
> To "possess with the intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

> The government must prove beyond a reasonable doubt that the defendants knew they were in possession of a controlled substance, but need not prove they knew which particular controlled substance was involved.

At the instruction conference the defendants urged that the last paragraph changed the charge to a crime of general intent rather than one of specific intent. The trial court overruled the objection. Defendant, on appeal urges that this instruction constitutes an improper amendment to or variance from the indictment. This specific objection was not made at trial. Therefore, in the absence of a clear showing of plain error the objection cannot be raised on appeal. Fed.P.Crim.P. 30, 52(b); United States v. Swafford, 766 F.2d 426, 429 (10th Cir. 1985). Since the instruction was a correct statement of law as applied to the evidence in the case, we do not find plain error. Id.

The judgment of the trial court is affirmed.

Entered for the Court

James O. Ellison
Senior District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

v.

Name: **VICENTE HERNANDEZ-VARGAS**
DOB: January 29, 1965
SSN: 620-28-7005

JUDGMENT IN A CRIMINAL CASE

Co. Reg. Out of
To Vote State

Timothy M. Padilla - Retained
Attorney for Defendant

Mailing
Address: 7259 E. Richfield Street
Paramount, CA 90723
(In custody of U. 5. Marshal)

Residence
Address: 7259 E. Richfield Street
Paramount, CA 90723

THE DEFENDANT ENTERED A PLEA OF:

__guilty ___nolo contendere as to count(s)__
X not guilty as to count(s) Indictment 93-654JB filed on November 19, 1993

THERE WAS A:

__finding X verdict of guilty as to count(s) Indictment 93-654JB filed on November 19 1993
__As tried to the Court. __X As tried before a jury.

THERE WAS A:

__finding __ verdict of guilty as to count(s)
__Judgment of acquittal as to count(s)___

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel.X Misd._)

Possession with Intent to Distribute 5 Kilograms or More of Cocaine, in violation of 21 USC 841(a)(1), 21 USC 841(b)(1)(A) as charged in Indictment 93-654JB filed on November 19, 1993.

The Court adopts the factual findings and guideline applications in the presentence report with the exception of paragraph 25, Acceptance of Responsibility. The Court finds that based on the statement given by the defendant shortly after his arrest, he is entitled to a reduction of two levels for acceptance of responsibility pursuant to 3E1.1(a). The Court finds that there is no need for an evidentiary bearing as there are no other disputed facts.

The Court now finds that the offense level is thirty-two (32) shall be reduced by two levels for acceptance of responsibility to

3E1.1 of the sentencing guidelines establishing an offense level of thirty (30). An offense level of thirty (30) combined with the criminal history category of I establishes a guideline imprisonment range of ninety-seven (97) to one hundred and twenty-one (121) months. Pursuant to 5G1.1(c)(2), the guideline range shall not be less than the statutory required minimum sentence. The statutory required minimum sentence pursuant to 21 USC 841(a)(1)(A) is ten (10) years. Therefore, the guideline imprisonment range shall be one hundred and twenty (120) to one hundred twenty-one (121) months. The Court takes judicial notice that the defendant was recruited and participated in the transportation of approximately 45 kilograms of cocaine. Further, the Court takes judicial notice that the defendant does not have a prior criminal record. The sentence imposed will reflect the sentencing goals of punishment, deterrence, and protection of the public.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to Indictment 93-654JB that the defendant, Vicente Hernandez-Vargas, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of one hundred twenty (120) months. Upon release from confinement, the defendant shall be placed on supervised release for a term of five (5) years. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U.S. Probation Office in the district to which he is released. While on

supervised release, the defendant shall not commit any federal, state, or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special conditions:

1) The defendant shall not possess firearms, explosives, or other dangerous weapons.

3) The defendant shall comply with all United States Immigration and Naturalization Service laws.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government cost of any imprisonment or supervised release.

The Court finds the defendant is a flight risk and a danger to the community; therefore, voluntary surrender shall not granted.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) Refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.
(2) Associate only with law-abiding persons and maintain reasonable hours.
(3) Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes).
(4) Not leave the judicial district without permission of the probation officer.
(5) Notify your probation officer immediately of any changes in your place of residence.
(6) Follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special

Assessment of $50.00, which shall be due immediately and payable by cashier's check, bank or postal money order to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount:_____
Amount Due:_____
Schedule of Payments:_____

Original Restitution Imposed:_____
Amount Due:_____
Payable To:_____

Schedule of Payments:_____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that count(s) _____ _____are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the clerk of the Court deliver a certified copy of the judgment to the United States Marshal of this district.

X The Court orders commitment to the custody of the Bureau of Prisons and recommends: service of sentence near place of residence consistent with Bureau of Prisons policy regarding offense severity and length of sentence.

July 15, 1994
Date of Imposition of Sentence

In accordance with Rule 32 (a)(2) of the Federal Rules of Criminal Procedure, you have the right to appeal the entry of this judgment within ten (10) days. Further, pursuant to 18 USC 3742, within ten days of the entry the Judgment, you have the right to appeal the final sentence of this Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal in forma pauperis if unable to pay the cost of an appeal.

/s/ by Juan G. Burciaga
Signature of Judicial Officer

Honorable Juan G. Burciaga, US District Judge
Name and Title of Judicial Officer

Date

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

_____

Defendant delivered on_____to _____ at _____ _____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

_____
BY: Deputy Marshal

APPENDIX D

MR. BUSTAMANTE: We have no witnesses to call, Your Honor.

THE COURT: Mr. Padilla?

MR. PADILLA: I have no further witnesses, Your Honor.

THE COURT: Mr. Serna?

MR. SERNA: No, Your Honor, I have no further witnesses.

THE COURT: All right, the following will be the Court's findings and conclusions.

First I'll address the motion to suppress, then I'll address the motion to suppress the photograph identification.

The evidence before the Court reveals that on the 18th of November of 1993 at approximately 1:25 p.m., or at least sometime around noon, Officer Candelaria and Officer Small were on their assigned details at the Amtrack station in Albuquerque, New Mexico.

And they met the train that was traveling from Los Angeles to Chicago. That is, Train Number 4, which was eastbound.

That Officer Small was alerted by Officer Barela that there were two large heavy suitcases in Coach Car Number 413. And that one was a Delci case setting above Seat 34, which was a blue case, and

a black Delci case in the compartment over Seat Number 11.

That Agent Small was taken by Agent Barela to see the bags. That Agent Small has made approximately fifteen hundred visits and investigations at the train station. And that of these times, that there were only seven times that he reports having seen these size of bags in the overhead storage compartments.

It appears that Agent Small did feel the blue bag and then he got off the train. When people started boarding the train for departure, that Agent Small boarded the train again and he saw defendant Hernandez standing, as he described, blocking the top of the stairs going up to the second floor of Coach Car Number 413.

That he noticed that defendant Alvarez was in the vicinity of Seat 11-12, and he saw them to make eye contact. And then Hernandez-Alvarez walked past Agent Small and went to the lounge car.

That Agent Small followed him and ne observed Hernandez to sit in one seat on the east side of the train, and he observed to sit - - as I said, Hernandez seated himself on one side of the car and defendant Alvarez sat at a different table on the opposite side of the car.

That he observed Barela approaching defendant Hernandez. That Agent Small then approached defendant Alvarez and asked if he could speak to him, and then - - although he spoke to him in English

originally, then in Spanish. That the conversation was translated by someone who spoke Spanish.

That Alvarez revealed that he was - - that he would speak to Agent Small, and he was traveling from Los Angeles to Chicago.

When Agent Small asked him for his ticket, he pointed to Hernandez. He did obtain from the defendant an ID, at least an alien card when he asked for identification.

And when Alvarez pointed to Hernandez as having the tickets, Agent Small went to Hernandez and asked to see the tickets.

That he was handed an envelope that had no tickets. That then Hernandez took out two ticket stubs from his wallet and handed them to Small. And these are represented by Government's 3.

When he observed the ticket stubs, he observed the name Lara, or Alfredo Lara or Lora. I believe it's Lara but I'm not quite sure, from the testimony of the witnesses.

When he asked Hernandez who Lara was, that Hernandez replied that his name was Alfredo, the person who had purchased the tickets. And then at that time Hernandez showed Agent Small his resident card. And also reported that he was going to Chicago.

When he was asked how he obtained transportation to his departure point at

Los Angeles, he indicated that he had taken a cab.

At that time he was asked if he would consent to be searched and he agreed. Agent Small patted him down and then the defendant emptied his pockets. At that time, Agent Small asked Alvarez if he would be willing to go with him upstairs to look at something, and he was accompanied also by Hernandez and Alvarez.

And they went upstairs and went to seats 11 and 12. That Agent Small observed two carry-on bags. When he asked if they owned the bag that was over seat of 11 and 12, they denied having any ownership in those bags.

Then Agent Small proceeded to Seats 33 and 34, and asked other people in the vicinity if they owned the bags. That there was one particular person sitting in Seat 33, and asked who belonged to the bag immediately over Seat 34, and the person occupying Seat 33 pointed to the defendant Gastelum.

And at the time Agent Small observed this, there was no one occupying Seat 34. That the gentleman responding to the inquiry point out defendant Gastelum as being his seat partner and indicated that Gastelum was traveling as Lara or Lara.

Agent Small then approached Hernandez and Alvarez, and asked if they knew Lara. That at no time did they turn in the direction of Lara. That they kept their back turned to him, but indicated that they did not know who he was.

Agent Candelaria testifies that he boarded the train with Small after they'd been informed of the two bags. Also according to Officer Candelaria, it was unusual to see these sizes of bags in the upper compartments.

And that when he arrived at the top and remained at the top of the car, he was able to see the vicinity of Seat 11, 12, and 34. That he observed Alvarez in Seat Number 12.

That at the time Small and Alvarez and Hernandez came to the car, or at least that portion of the car, he observed Hernandez to make eye contact with Lara when they left for the lounge car.

He observed Alvarez to get up and follow Hernandez, and Candelaria remained behind in the car. Approximately five minutes later defendant Gastelum arrived and occupied Seat Number 34.

When Agent Small and Alvarez and Hernandez returned, he observed defendant Gastelum to vacate Seat Number 34 and occupy the seat immediately in front of that and then leaned out to observe what was occurring among Small, Hernandez and Alvarez.

Candelaria then approached Gastelum and asked him where he was traveling, and he indicated he was going to Chicago, and he produced a ticket stub from his pocket. He indicated that he was traveling on - - and the ticket reflected that it had been issued to Alfredo Lara.

It was a one-way ticket and that it had been paid for in cash.

At that time, defendant Gastelum indicated that Lara had purchased tickets for him, and he identified the purchaser as a relative. And all the items of property were returned by Agent Candelaria to defendant Gastelum.

He observed - - he asked the defendant if he had any luggage. He identified a dufflebag which was in the overhead compartment, and he permitted Agent Candelaria to search that bag.

When he asked if he knew Hernandez and Alvarez, he indicated that he did not, that he had merely been carrying on a conversation with them, but he repeatedly indicated that he did not know the other two defendants.

Upon learning that the three defendants were traveling under the same name of Lara, then Agent Candelaria so informed Agent Small.

After efforts were made to determine if anyone belonged to the bags over Seat 34, the Delci bag, and also the bag over Seat 11, Agent Candelaria obtained an attendant to try to determine if anyone could be identified with the bag, and they were unable to do so.

At that point, Officer Candelaria removed the bag over Seat 34 and other agents removed the other bags and took them to the train platform.

After a dog alerted on the two bags, the agents returned to the train and placed the defendants under arrest. They subsequently were given their Miranda warnings after they had been removed to the DEA office, and three statements were subsequently made.

The Tenth Circuit has indicated that a law enforcement officer is permitted to make a limited search of an individual suspected of criminal activity if the officer has specific and articulable facts which taken together with rational inferences from those facts reasonably warrant intrusion.

There are three types of encounters that have been identified by the Tenth Circuit, the first one being the police-citizen encounter, which is characterized by voluntary cooperation of a citizen in response to non-coercive questioning.

The second type of encounter is a Terry type of encounter, which is characterized by a brief non-intrusive detention during a frisk for weapons or preliminary questioning.

This is considered a seizure of the person within the meaning of the Fourth Amendment, but need not be supported by probable cause.

And in order to justify the third, which is the investigatory stop, the officer need have only specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime.

Under the totality of the circumstances, the fact that the three defendants were traveling under the same name on the same ticket, and when they denied knowing each other, that gave sufficient articulable - - those were sufficient articulable specific facts which gave a reasonable suspicion that there was a - - at least a crime was being committed.

It is not clear from the record, but apparently there was some belief by the officers that these three individuals were associated with the Delci bags and also the other bag that had a floral pattern, the cloth soft bag.

From the totality of the circumstances, the Court finds that they could reasonably stop these individuals for what the Court considers a brief, and although I would not consider it non-intrusive, I do consider it being a brief stop and was not beyond what is constitutionally permitted.

At one time the Court had a different view of what Bostic and Tenth Circuit allows on the case, but I've since been informed through a reversal in U.S. versus Little that what I believe was the law prior to Little is not now the law.

So based upon the Little case, the Court finds that this was a permissive seizure, brief seizure of the defendants. I will note that they were not arrested, they were seized briefly while they respond to questions and they were not

arrested until or even detained once the agents removed the bags from the train.

However, once the dog alerted, they then had probable cause to arrest the defendants.

Those will be the Court's ruling on the motion to suppress the statements.

MR. WILLIAMS: Your Honor --

THE COURT: Yes, Sir.

MR. WILLIAMS: -- would the Court address or make a conclusion or a finding as to whether the defendants had standing?

THE COURT: Well, I was going to address the abandoning issue, but it is clear from the record that there's nothing to indicate they ever admitted a connection with the bags.

The attorneys for the defendants have stated that they were not claiming a right of privacy, or did not have a reasonable expectation of privacy in the three bags.

However, I also find that under the Tenth Circuit case of United States versus Morgan, that under the Tenth Circuit law as the Court understands it, and also under United States versus Jones, that the defendants did in fact abandon the bags and they had no standing to object to the seizure nor the search of those three bags.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: Now as far as the motion to suppress the photographic identification that was addressed by the Court initially this morning, I'll make the following findings:

That Officer Candelaria traveled to Los Angeles after a telephonic contact with Ms. Faye Williams, who was an Amtrak employee, That he learned that the three defendants in this case were traveling on tickets purchased by Alfredo Lara.

That he made this trip on November 30th to Los Angeles, and went to the Amtrak station in Pasadena. That Ms. Williams described one of the defendants as being an Hispanic in his fifties. Well, she's testified middle-aged, with two others.

That the encounter with Ms. Williams consumed from thirty to forty-five minutes while the defendants discussed the purchase and travel. That they inquired of the routes to be traveled from Los Angeles to Chicago. That after being explained of the northern and southern route, the defendant - - or at least the defendant purchasing it, which is the defendant Gastelum, chose and selected the southern route, and Ms. Williams delivered to them tickets after they paid cash for the tickets.

That at that meeting, Officer Candelaria produced a manila envelope with photographs, consisting of three photographs, which to the Court to appear to be persons of similar appearance.

That Ms. Williams picked Number 2, which is the top center in the array which is before the Court as Plaintiff's 1.

And that she identified him as being the purchaser of the tickets, or in her understanding, Alfredo Lara, who is the defendant Mario Israel Gastelum-Murguia.

When asked by Mr. Serna of Ms. Williams if she relied upon her memory of the events before on identifying the defendant or whether she had some problem with her memory, she indicated that she did not.

That she relied upon her memory of the events on that day to identify defendant Gastelum, and that she had no problem in relying upon her memory to select defendant Gastelum from the photo array. That she relied upon her memory, and the subsequent events had no effect on her making that selection from the photos.

Those will be the Court's findings as to that motion and the Court will deny that motion to suppress photographic identification.

Yes, Mr. Padilla.

MR. PADILLA: Your Honor, may I have for a point of clarification, and I understand the Court's ruling in regards to the probable cause to seize the bags. I'm wondering if probable cause to arrest the defendants, if it's the Court's finding that there was a nexxus between the bags seized and the defendants in this case.

THE COURT: Well, as I said, for the moment, I'm not clear on exactly what the evidence was, that was never gone into, but there was some connection, but the testimony from Officer Candelaria is that he knew that these defendants owned the bags.

And that is the only evidence going to the issue of possession that I recall, Mr. Padilla. So I state that on the basis of the evidence, and that was not tested on cross examination, that these defendants were the owners of the bags and that they abandoned the bags.

MR. PADILLA: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. SERNA: Your Honor, I don't want to get into any argument with the Court. I asked Officer Candelaria if he had anything in his investigation from any source that showed that any of these co-defendants exercised any control over these bags and his answer was, only from the defendants, and, of course, these were post-arrest statements.

So I think that's why we were asking about the nexxus at the time of arrest.

THE COURT: All right. Well, those will be my rulings. As I indicated, there was probable cause, at least to detain, and as I understood it, that was the question that was before the Court, and as I understood counsel's statements is that - - as I recall it, that you were only contesting the seizure of the defendants

and that you were not arguing that they had any reasonable expectation of the bags. And that's exactly the way the proof has come in.

MR. SERNA: That's correct, Your Honor, although I think each of us in our motions also argued that there was an insufficient nexxus to connect the defendants to the bags, so that even if there was probable cause to arrest the defendants.

THE COURT: All right. Well, as I indicated, that they were not arrested until the dog alerted on the three bags, and at that point they were arrested.

MR SERNA: Your Honor, I have two other motions,